Supreme Court, U.S.
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No. 96-375

In The

Supreme Court of the United States

October Term, 1995

ABDULLAH E. AL-HARBI,

Petitioner,

vs.

CITIBANK, N.A. and CITIBANK, a.s.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITIONER

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUITS IS NOT "MANUFACTURED." IT IS AN IMPORTANT SPLIT AFFECTING A DUTY OF ARBITRATORS THAT IS RECOGNIZED BY THE AMERICAN BAR ASSOCIATION AND THE AMERICAN ARBITRATION ASSOCIATION.

The Respondents argue that the split of authority among the federal circuits as to whether an arbitrator has a duty to make a reasonable pre-arbitration conflict investigation is "manufactured" by the Petitioner, citing the fact that an NASD rule in the Ninth Circuit case, *Schmitz v. Zilveti,* 20 F.3d 1043 (9th Cir. 1994), contained a mandatory requirement for the arbitrator to make a pre-arbitration investigation. This does not change the fact that the split of authority exists. The issue of law here is whether "actual bias" is required, or whether an arbitrator must undertake a reasonable pre-arbitration investigation to discover and disclose facts which could constitute "evident partiality" under the Federal Arbitration Act. The opinion in *Schmitz* went far beyond the NASD rule, stating as a *general proposition* that, "an arbitrator may have a duty to investigate independent of its . . . duty to disclose," and further observed that "[a] violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality." 20 F.3d at 1048.

To illustrate the split of authority, the full quotation from *Schmitz* is illustrative:

> Some courts have considered an arbitrator's lack of knowledge as a factor in determining

> whether evident partiality was present. See, e.g., — *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F. Supp. 107, 109-12 (D.D.C. 1976). The district court in this case made this factor decisive. The district court's conclusion appears to be premised on the idea that no person could reasonably conclude that an arbitrator could act partially based on facts of which he was unaware. *Anaconda*, 418 F. Supp. at 112.
>
> * * *
>
> Appellants have a better argument. Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality. As Appellants argue, an arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*.

20 F.3d 1048. An "independent duty to investigate" does not arise out of a statutory rule — it arises out of an arbitrator's inherent duty to investigate and disclose facts that may create an "impression of partiality." As further stated by the Ninth Circuit, it is the parties themselves, rather than the arbitrators, who have the right to determine if there is "evident partiality":

> *Commonwealth Coatings* establishes that the parties rather than the arbitrators or the

> courts should be the judges of the partiality of arbitrators.

20 F.3d 1048.

The "independent duty to investigate" is recognized by the American Bar Association and the American Arbitration Association. The most comprehensive ethical guide for arbitrators is "The Code of Ethics for Arbitrators in Commercial Disputes", jointly adopted in 1977 by the American Arbitration Association and the American Bar Association. Canon II of the Code of Ethics for Arbitrators requires commercial arbitrators to make a reasonable investigation to inform themselves of potential conflicts:

> CANON II
>
> AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY OR BIAS.
>
> * * *
>
> Disclosure.
>
> A. Persons who are requested to serve as arbitrators should, before accepting, disclose
>
> * * *
>
> (2) any existing or *past* financial,

> business, professional — relationships — *which might reasonably create an appearance of partiality or bias.* — They should also disclose any such relationships involving — partners or business associates.
>
> B. Persons who are requested to accept appointment as arbitrators *should make a reasonable effort to inform themselves of any interests or relationships described in the preceding paragraph A.* [Emphasis added].

As stated in the Preamble of the Code "[T]he persons who have the power to decide should observe fundamental standards of ethical conduct." Thus, the American Bar Association and the American Arbitration Association agree with the position taken by the Ninth Circuit in *Schmitz* — that arbitrators have an independent duty to conduct a reasonable pre-arbitration conflict investigation and reveal the results to the participants.

The trial court below, and the Respondents here, relied heavily on *Anaconda,* an outdated case, where the District Court of the District of Columbia had held that actual bias would be required. The rationale of the decision in *Anaconda* was specifically rejected in *Schmitz,* which specifically declined to follow *Anaconda.* It should be noted that *Anaconda* was decided in 1976, before the American Bar Association and the American Arbitration Association adopted the Code of Ethics for Commercial Arbitrators, which requires arbitrators to investigate and disclose interests or relationships which might reasonably create an appearance of partiality or bias.

The line of cases represented by *Peoples Security Life Insurance Company v. Monumental Life Insurance Company,* 991 F.2d 141 (4th Cir. 1993) and *Anaconda* is clearly contrary to *Schmitz* and the Code of Ethics for Arbitrators adopted by the American Bar Association and the American Arbitration Association. By requiring proof of an arbitrator's present knowledge of facts constituting actual bias before an arbitration award will be vacated on the ground of "evident partiality", this standard results in no "independent duty to investigate", since the arbitrator may rely on his present knowledge.

There can be no clearer split of authority on the arbitrator's duty, or lack thereof, to make a pre-arbitration investigation for possible conflicts of interest. Due to the ever-growing importance of arbitration in the business community and the need for clarity of duty on the part of arbitrators, this split of authority should be resolved.

II.

THE RESPONDENT'S PROPOSED RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW SHOULD BE DISREGARDED AND CERTIORARI GRANTED ON THE PETITIONER'S QUESTION PRESENTED FOR REVIEW.

The Respondent's proposed restatement of the question is unnecessarily convoluted and argumentative, while the Petitioner's statement of the question presented for review is an accurate statement of the split of authority that is sought to be resolved.

For example, the Respondent's proposed restatement of the question infers (1) that the Petitioner had a duty to demand that the arbitrator conduct a pre-arbitration conflict investigation;

and (2) contrary to *Schmitz*, that it was the arbitrator, and not the Petitioner who had the right to make the decision on "evident partiality". Both inferences are merely argumentative conclusions that are hotly disputed, but are assumed to be true in the restated question. It is undisputed that the arbitrator's former law firm represented Citibank. Respondent's Brief at page 3. Any reasonable person could conclude that "evident partiality" could result. Thus, the underlying premise of the Respondent's restated question rests on shifting sands. An answer to the Respondent's "question" would create even more confusion on the real issue, and would not resolve the split of authority among the federal circuits.

CONCLUSION

To resolve the evident split of authority on this important issue, Certiorari should be granted on the Petitioner's statement of the question presented for review.

Respectfully submitted,

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